duty not to mislead the defendant about whether its files contain exculpatory evidence and the Third Circuit's broad rule that a *Brady* violation is excused whenever the defendant could have uncovered the evidence himself through due diligence. Pet. App. 24a. The Third Circuit reconciled this "intersection" in favor of the latter principle, holding that even repeated misrepresentations by the government about the contents of various documents in its possession are excused so long as the government makes the documents available to the defendant, who could discover their actual contents on his own. *Id.* at 30a.

The Third Circuit set forth as the touchstone for its analysis the principle, "well-established" in the precedent of that court, "that 'the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.'" Pet. App. 4a (quoting *United States* v. *Starusko*, 729 F.2d 256, 272 (CA3 1984)). Applying that standard, the Third Circuit held that the government's offer to make the Florida documents available to petitioner for copying imposed on petitioner a duty to investigate those documents himself, regardless of what the government represented about their contents. "*Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed." *Id.* at 23a. "[T]he government in this case made the [Florida] documents available to the defense, without specifying any particular documents that were helpful to the defense, something *Brady* does not obligate it to do. In such circumstances, the burden is on the defendant to exercise reasonable diligence." *Id.* at 24a.

Critically, the court of appeals concluded that the government's offer to make the Florida documents available for copying excused it from any responsibility for its repeated misstatements – before and during trial – that the documents

were irrelevant. "[D]efense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, *even where there might be some showing of governmental impropriety*." Pet. App. 29a (emphasis added). "The fact of the matter is that the government's post-1996 representations [i.e., those on the eve of and during the trial] did not eliminate its previous offers to make the warehouse documents available to the defense, and in no way absolved the defense of its failure to exercise due diligence during the many months between indictment and trial." *Id.* at 27a.

With respect to the critical misstatements on the eve of and during the trial, the court of appeals thought that "there could not be any genuine reliance by Pelullo on the government's statements, as there was no realistic opportunity for [Pelullo's counsel] to review the warehouse documents" during that period. Pet. App. 27a. It reached that conclusion despite simultaneously remarking upon "*the ease* with which Pelullo discovered the relevant warehouse documents after trial" (*id.* at 28a (emphasis added)) once he learned of the testimony of the government's witnesses. It also opined that "[b]ecause the government in this case *had no knowledge of the exculpatory materials contained in the warehouse documents*, its affirmative representations are far less susceptible of reliance * * *." *Id.* at 29a n.19 (emphasis in original). The court of appeals thus accorded no weight to the government's representations to petitioner and to the district court that it had reviewed the documents and was continuing to do so.

6. After the Third Circuit denied rehearing and rehearing en banc (Pet. App. 88a-89a), this petition followed.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's "Due Diligence" Exception To *Brady* v. *Maryland* Conflicts With Decisions Of Other Circuits.

This case presents the Court with an ideal opportunity to decide an exceedingly important unresolved question about

the government's obligation to disclose evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The courts of appeals are squarely divided over whether the prosecution's failure to disclose evidence under *Brady* may be excused by the defendant's own failure to exercise "diligence" in uncovering that evidence himself.

Both on the eve of and during the trial, prosecutors represented to both petitioner and the court that the documents held by the government in Florida did not contain any relevant evidence. Those representations were false. The district court found that if petitioner's attorneys had reviewed the materials in Florida, they would have discovered a mass of exculpatory evidence that would have seriously undermined the government's case. The Third Circuit nonetheless held that the government's failure to abide by its *Brady* obligations was excused because, under that court's settled precedent, a defendant has a duty to exercise "due diligence" to uncover any exculpatory evidence the government fails to disclose. The court of appeals in this case moreover extended that principle to hold that no *Brady* violation occurs *even if the government represents that no such evidence exists*.

Certiorari is warranted because the Third Circuit's holding widens a three-way circuit conflict. The Third Circuit and three other courts of appeals apply a broad "due diligence" exception to *Brady*. By contrast, three circuits flatly reject such a rule, holding that the prosecution's duty to disclose relevant evidence exists independent of the defendant's ability to secure that evidence himself. Four other circuits adopt a middle ground. While applying the due diligence principle generally, they explicitly reject its application when, as here, the prosecution misleads the defendant into not pursuing the evidence in question or when the evidence only becomes relevant at trial. These courts recognize that "due diligence" cannot reasonably require the defendant to assume the government is lying or to divert its attention from an ongoing trial to conduct an investigation.

There can be no serious dispute that the conflict exists and that it merits this Court's attention. The government acknowledged the existence of a conflict in its briefing below. See Gov't C.A. Reply Br. 31 n.27. Moreover, this Court previously granted certiorari to resolve the conflict in *Strickler* v. *Greene*, 527 U.S. 263 (1999). In *Strickler*, the Fourth Circuit had rejected the defendant's *Brady* claim on the ground that a defendant "cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence," reasoning that the defendant could have secured certain exhibits by making a request before the state court. *Strickler* v. *Pruett*, Nos. 97-29 & -30, 1998 U.S. App. LEXIS 12805, at *27 (June 17, 1998) (quoting *Stockton* v. *Murray*, 41 F.3d 920, 925 (CA4 1994)). Strickler's petition to this Court framed the question presented by his case as "[w]hether the government's duty under the Due Process Clause and *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence to the defense is limited by a due diligence exception imposed on defense counsel. If so, is the due diligence exception applicable only to evidence readily available to the defense in a public forum." Pet. for Cert., No. 98-5864, at i.[3] Because *Strickler* did not ultimately decide the issue squarely (see *infra* at 21), it remains ripe for resolution in this case.

1. As the panel indicated, the Third Circuit's acceptance of a "diligent defendant" exception to *Brady* is "well established." Pet. App. 4a (citing *United States* v. *Starusko*, 729 F.2d 256, 262 (CA3 1984)). Three other circuits have also broadly embraced such a rule. *E.g.*, *United States* v. *Cottage*, 307 F.3d 494, 499-500 (CA6 2002); *United States* v. *O'Hara*,

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[3] To address other issues raised by the State in its opposition to certiorari, the Court's Order granting certiorari reframed the question more generally as "Whether the State violated *Brady v. Maryland*, 373 U.S. 83, and its progeny" and directed the parties to brief two other questions as well. 525 U.S. 809 (1998).

301 F.3d 563, 569 (CA7 2002); *United States* v. *Schlei*, 122 F.3d 944, 989 (CA11 1997).

The "due diligence" principle applied by these courts squarely conflicts, however, with decisions of the Ninth, Tenth, and D.C. Circuits. Those courts all expressly reject any such exception to *Brady*. In *Gantt* v. *Roe*, 389 F.3d 908 (CA9 2004) (Kozinski, J.), prosecutors learned that two witnesses did not know a murder victim, information that would have been exculpatory to the defendant. The government disclosed the existence of the witness interviews to the defendant but omitted the fact that the witnesses denied knowing the victim. There, as here, the government argued that its *Brady* obligations were excused by "the defense lawyer's failure to investigate." *Id.* at 912-13. The court of appeals acknowledged that the defense could have discovered the same information, but squarely held that fact was irrelevant:

> While the defense could have been more diligent * * * this does not absolve the prosecution of its *Brady* responsibilities. As the Supreme Court reiterated just last Term, '[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.' *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 1275 (2004).

Id. at 912-13. Indeed, the Ninth Circuit found that the case presented "an even stronger argument for disclosure" than *Banks* because "defense counsel here relied not merely on the force of *Brady* itself, but also – as with the prosecution's claimed 'open file' policy in *Strickler* [v. *Green*] – on affirmative representations by the prosecution that it was keeping the defense apprised of developments in the investigation. Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* at 913.

Other Ninth Circuit precedent reaches the identical result. See *Benn* v. *Lambert*, 283 F.3d 1040 (2002) (when defendant

"knew of the experts' existence but had been supplied with evidence by the state that the experts' view supported the state's theory," he "is not required to assume that the state has concealed material information and has thereby obligated him to ascertain the *Brady* material on his own"); *United States* v. *Howell*, 231 F.3d 615, 625 (2000) ("The availability of particular statements through the defendant himself does not negate the government's duty to disclose."); *United States* v. *Shaffer*, 789 F.2d 682, 690 (1986) ("[W]hile the government did apprise Shaffer's counsel of tapes that detailed Durand's involvement, such disclosure was inadequate because the government also told Shaffer's counsel that these tapes would be of no value to Shaffer's defense. *This later statement by the government negates any disclosure made in the earlier statement.*" (emphasis added)).

The Tenth Circuit has likewise rejected a "diligent defendant" exception to *Brady*. In *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), that court rejected the government's argument that the defendant's failure to conduct an investigation obviated its obligation under *Brady* to disclose information regarding the arrest of two other suspects, the testimony of a witness that the second suspect had confessed to the crime, the fact that the second suspect had been bound over for the murder on a finding of probable cause, and the second suspect's guilty plea on the possession of a forged instrument charge. *Id* at 1511. The Tenth Circuit accepted that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation" in the limited sense that "if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Id.* at 1517. But outside that context, the court concluded, "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, '[i]f the prosecution possesses evidence that, in the context of a particular case is ob-

viously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made.'" *Ibid.* (quoting *Smith* v. *Secretary of N.M. Dep't of Corrections*, 50 F.3d 801, 827 (CA10 1995)). "[T]he fact that defense counsel 'knew or should have known' about the * * * information * * * is *irrelevant* to whether the prosecution had an obligation to disclose the information. The *only relevant inquiry* is whether the information was 'exculpatory.'" *Ibid.* See also *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (CA10 1999) (reaffirming *Banks* v. *Reynolds*, and excusing *Brady* violation only when the "defendant already has a particular piece of evidence"); *Smith*, 50 F.3d at 833 (rejecting state's argument that *Brady* violation was excused because evidence was available from police evidence room upon request).

The D.C. Circuit agrees with the Ninth and Tenth Circuits that there is no "due diligence" exception to *Brady*. In *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887 (1999), that court held that the government violated *Brady* by failing to disclose a cooperation agreement between prosecutors and a witness. The court expressly rejected "the government's appellate argument that it did not breach a disclosure obligation with respect to Jones' cooperation agreements because that information was otherwise available through 'reasonable pre-trial preparation by the defense.'" *Id.* at 896-97. The D.C. Circuit relied on this Court's unambiguous determination in *Strickler* that "the prosecutor is responsible for 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *Id.* at 897 (quoting *Strickler*, 527 U.S. at 275 n.12 (quoting in turn *Kyles* v. *Whitley*, 514 U.S. at 419, 437 (1995))). On that basis, the D.C. Circuit concluded that "defense counsel was no more required to subpoena the officers to learn of their agreements, than she was to subpoena the prosecutor to learn of hers. The appropriate way for defense counsel to obtain such information was to make a *Brady* request of the prosecutor, just as she did." *Ibid.*

The D.C. Circuit's decision in *In re Sealed Case* applies the same rule that court adopted more than thirty years earlier in *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (1966). In *Levin*, the court recognized that in *other* contexts "a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence." *Id.* at 291. But the D.C. Circuit explicitly concluded that a prosecutor's duty to disclose relevant evidence is different: "appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief * * * may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.'" *Ibid.*

The D.C., Ninth, and Tenth Circuits unquestionably would have affirmed the district court's determination in this case that petitioner was entitled to a new trial. Those courts squarely hold that prosecutors' violations of *Brady* are not in any respect excused by a defendant's ability to uncover exculpatory evidence independent of the government. They would accordingly reject the Third Circuit's holding that the government was free to misstate the contents of the Florida documents because it made those documents available to petitioner for his own inspection.

Indeed, a court that rejects the "due diligence" exception would find the facts of this case particularly troubling. The government's offers to make the Florida documents "available" were of limited value because the government also indicated that petitioner would *not* be entitled to review those documents that the government regarded as relevant only to the Florida investigation.[4] When the government did finally

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[4] See, *e.g.*, Pet. App. 10a (Prosecutor: "They may not bear on this case, and I don't know * * * if it is appropriate for Mr. Pelullo to use this case as a vehicle to go on a fishing expedition as to some

agree to allow petitioner access to the documents, it insisted that petitioner – who was jailed and impoverished – bear the costs of photocopying all of them, conservatively estimated at over $50,000 (see Pet. C.A. Br. 45 n.10).[5] It is not at all surprising that, rather than accepting the government's offer, petitioner relied upon the government's insistence that the documents were irrelevant.

2. The Third Circuit's ruling that the prosecutors' misrepresentations to petitioner were excused by petitioner's supposed lack of diligence also widens a separate circuit conflict over the *scope* of any "due diligence" exception to *Brady*. The First, Second, Fourth, and Fifth Circuits agree with the Third Circuit – and disagree with the D.C., Ninth, and Tenth Circuits – that there is generally a "diligent defendant" obligation to seek out exculpatory evidence. But the First, Second, Fourth, and Fifth Circuits would nonetheless reach the opposite result of the Third Circuit in the recurring factual circumstances presented by this case.

a. The First and Fifth Circuits have squarely held that, although there is a general requirement of "diligence,"[6] the

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other investigation which is currently going on Florida. I can confer with the Assistant U.S. Attorney in Florida to be sure that is the case. If she tells me that * * * the documents that are in Jacksonville bear on her investigation and do not bear on Compton, I would object and would ask the Court to advise Mr. Pelullo that * * * he is not entitled to those documents.").

[5] Given the government's representation that the documents were irrelevant, and the fact that petitioner had no grounds to dispute this claim, petitioner would have had no basis for requesting that the documents be copied at the government's expense. Even if he could have raised the funds himself, petitioner had no reasonable expectation that he would be reimbursed for the massive copying costs. Contra Pet. App. 23a n.15 (relying on the fact that reimbursement was theoretically possible).

[6] See *Rector* v. *Johnson*, 120 F.3d 551, 558-59 (CA5 1997) ("The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the pos-

prosecution violates *Brady* if it misleads the defendant about exculpatory evidence, even if the defendant could otherwise have discovered the evidence himself. The First Circuit's rule is embodied by *McCambridge* v. *Hall*, 303 F.3d 24 (2002). In that case, the defendant could have discovered the criminal record of a government witness through his own investigation but had been advised by the prosecution that the witness did not have one. The court of appeals, citing this Court's decision in *Strickler*, held that the defendant was entitled to rely upon the government's representations. *Id.* at 48-49. Notably, the court of appeals found it irrelevant that the government's representations had been "equivocal" in the sense of "the prosecutor's occasional use of the words 'as far as I know.'" *Ibid.* The First Circuit held that the government "cannot escape its *Brady* obligations by qualifying its nondisclosure of exculpatory evidence and then shifting its disclosure burden to defense counsel. Moreover, the potential mischief invited by the Commonwealth's argument provides strong reason for rejecting it." *Ibid.*

To the same effect is *Freeman* v. *Georgia*, 599 F.2d 65 (1979), in which the Fifth Circuit held that prosecutors violated *Brady* by concealing the location of a witness who would provide exculpatory testimony. The court acknowledged that the defendant could have attempted to subpoena the witness or moved for a continuance or mistrial when she did not appear. *Id.* at 68. Yet, as it emphasized, the witness statement that the government had disclosed to the defense had not included the exculpatory material. "When a police statement misleads the defense into believing that evidence will not be favorable, the state cannot thereafter argue that it

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session of the defendant or can be discovered by exercising due diligence."); *Lugo* v. *Munoz*, 682 F.2d 7, 9-10 (CA1 1982) ("Since the information at issue here was available to the defense attorney through diligent discovery, we find that the prosecutor's omission was not of sufficient significance to result in the denial of the defendant's right to a fair trial." (internal quotation marks omitted)).

was a waiver not to request it. A defendant cannot have waived more than what he knew existed." *Id.* at 72. See also *Hughes* v. *Hopper*, 629 F.2d 1036, 1039 (CA5 1980) (reaffirming *Freeman*).

b. The Second and Fourth Circuits recognize another exception to the "diligent defendant" requirement: they hold that a defendant's obligation to exercise diligence does not extend to circumstances in which the government provides the defense with related evidence, thereby giving the impression that full disclosure has been made. Under that approach, the government's conduct in this case clearly violated *Brady*: it not only disclosed six boxes of materials that it had culled from the Florida documents and thereby implied that the remaining files were irrelevant, but it also explicitly assured petitioner that its disclosure had been complete.

United States v. *Payne*, 63 F.3d 1200, 1208-09 (CA2 1995), recognized the Second Circuit's rule that ordinarily "evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney 'either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.'" (quoting *United States* v. *Zackson*, 6 F.3d 911, 918 (CA2 1993)) (alteration in original and other quotation marks and citations omitted). However, the court proceeded to hold that the defendant was not obligated to search a public court file for a witness's affidavit when the government had already produced "other materials concerning [the witness], including numerous documents relating to the federal investigation and her prosecution. * * * A defendant receiving such documents from the government could reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents pertaining to [the witness] * * *." *Ibid.*

The Fourth Circuit recognized a similar exception to its general diligence requirement in *United States* v. *Ellis*, 121 F.3d 908 (1997). In that case, prosecutors responded to the defendant's request that the government disclose all *Brady*

material by indicating that they had provided all relevant FBI reports. As in this case, the government had provided some – but not all – of the relevant material. The Fourth Circuit held that even if the defendant could have uncovered information available in the undisclosed FBI report from other sources, he was not obligated to do so. *Id.* at 914-15. See also *id.* (citing *Barnes* v. *Thompson*, 58 F.3d 971, 984 (CA4) (Murnaghan, J., concurring) ("A reasonable defendant would not have looked into the matter any further once the prosecuting attorney represented that the Commonwealth did not possess exculpatory evidence."), cert. denied, 516 U.S. 972 (1995)).[7]

c. Both the Second and Fourth Circuits have also held that a defendant's duty to investigate does not extend to evidence that does not become relevant until trial. Those courts recognize that, at that very late point in the proceedings, it is not reasonable to expect the defense to divert its attention towards further investigation. Rather, the government must make the disclosure itself. See *Leka* v. *Portuondo*, 257 F.3d 89, 100-03 (CA2 2001) ("[O]nce trial comes, the prosecution may not assume that the defense is still in the investigatory mode."); *United States* v. *Kelly*, 35 F.3d 929, 937 (CA4 1994).

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Because several other courts of appeals reject the Third Circuit's rule that prosecutorial misrepresentations about the

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[7] State courts have adopted the same rule. See, *e.g.*, *Prewitt* v. *State*, 819 N.E.2d 393, 407-08 (Ind. App. 2004) (no failure to exercise due diligence when defendant "justifiably relied upon these affirmative misrepresentations"); *Ware* v. *State*, 702 A.2d 699, 708-09 (Md. 1997) (adopting Second Circuit's decision in *Payne*).

For its part, the Fifth Circuit has recognized a "diligent defendant" exception to *Brady*, but in an unpublished opinion acknowledged that, under this Court's precedents, that exception is inapposite when the government represents that no further exculpatory evidence exists. *Mathis* v. *Dretke*, 124 Fed. Appx. 865, 876-77, cert. denied, 2005 U.S. LEXIS 4922 (2005).

availability of relevant evidence are excused by the defendant's own ability to discover that evidence, and because the large number of cases in which the question arises demonstrates that it is an important and recurring question of federal law, certiorari should be granted here, just as it was in *Strickler*.

II. The Third Circuit's Holding That Prosecutorial Misrepresentations About The Availability Of Relevant Evidence Are Excused By A Defendant's Ability To Uncover That Evidence Himself Conflicts With This Court's Precedents.

Certiorari is also warranted because the Third Circuit's decision is contrary to this Court's precedents. The court of appeals held that the government's misstatements were excused because it had previously provided petitioner with access to those documents: "The fact of the matter is that the government's post-1996 representations did not eliminate its previous offers to make the warehouse documents available to the defense, and in no way absolved the defense of its failure to exercise due diligence during the many months between indictment and trial." Pet. App. 27a. That ruling conflicts with this Court's precedents, which firmly establish that the government violates *Brady* when it misrepresents the nature of available, relevant evidence, even when the defendant could have acquired the evidence himself.

1. As discussed *supra* at 11, this Court granted certiorari in *Strickler* v. *Green* to resolve the established circuit conflict, also presented by this case, over whether there is a "due diligence" exception to prosecutors' duty to disclose relevant evidence under *Brady*. While the *Strickler* Court reversed the Fourth Circuit's judgment denying the petitioner's *Brady* claim, it did so without squarely resolving the circuit conflict presented. Instead, the Court focused on the fact that the prosecution had misstated the availability of relevant evidence. 527 U.S. at 283-84 n.23. The Court also found it significant that the prosecution had disclosed some related ex-

hibits. *Id.* at 284. "[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 283-84 n.23. The government's conduct in petitioner's case is indistinguishable: disclosing six boxes of files from the Florida warehouse and representing that these boxes contained all of the evidence relevant to petitioner's case.

This Court subsequently reiterated and applied *Strickler*'s holding in *Banks* v. *Dretke*, 540 U.S. 668 (2004), in which prosecutors argued that their failure to disclose certain relevant witness statements did not violate *Brady* because the defense could have located the witness itself. The *Banks* Court noted that it had "rejected a similar argument in *Strickler*," in which the state had "contended that examination of a witness' trial testimony, alongside a letter that witness published in a local newspaper, should have alerted the petitioner to the existence of" the statements. *Banks*, 540 U.S. at 695-96. Accordingly, the *Banks* Court rejected the prosecution's argument, finding that because "the State asserted, on the eve of trial, that it would disclose all *Brady* material," "[a]s *Strickler* instructs, Banks cannot be faulted for relying on that representation." *Id.* at 693. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. Rather, a defendant is "entitled to treat the prosecutor's submissions as truthful." *Id.* at 698.

The wisdom of this Court's holdings in *Strickler* and *Banks* that prosecutors must be held responsible for their representations regarding the existence of relevant evidence is manifest. The premise of the *Brady* doctrine is that defense counsel and courts will rely on the government's representations that full disclosures have been made. Otherwise, the government would be bombarded by constant demands from defendants and disclosure orders from courts. Defense counsel would moreover be required to investigate every possible

source of documents, inevitably delaying the criminal justice process. It is accordingly well-settled, as *Strickler* and *Banks* make clear, that the government must honestly represent the completeness of its disclosures at all stages of the proceedings.

The district court's ruling ordering a new trial in this case is plainly correct under this Court's precedents, and the Third Circuit's contrary ruling should be reversed. Because of the government's misrepresentations, petitioner's counsel did not direct that the Florida files be searched for the documents that – as the district court later found – seriously undermined the credibility of the government's witnesses and, hence, the confidence in petitioner's conviction. Counsel's failure to do so is not surprising, given that it is undisputed that prosecutors personally advised him at the time of trial "that * * * there were no documents in Jacksonville pertaining to Compton Press or the charges against Mr. Pelullo in this district and that I should not bother to go to Jacksonville." Pet. App. 15a.

The misrepresentations that the government made to petitioner's counsel are far more substantial than the misstatements in *Strickler* and *Banks*. Although the court of appeals stated, without explanation, that the government's representations were "in many instances, equivocal," Pet. App. 25a, the factual findings of the district and the evidence are to the contrary. As the government conceded in its brief below, it advised petitioner in no uncertain terms that "it had culled all relevant material from the [Florida] warehouse documents." Gov't C.A. Br. 57. And the district court found that, "*time and again*," the government assured petitioner and that court that it "had gotten all the relevant documents from the Florida warehouse." C.A. J.A. 3930 (emphasis added). In 1994, after the court specifically directed the government to "find out" if there were relevant documents in Florida "and if there are, make them available to the defendant[]," the prosecutor responded: "Again it is our position that, while I believe all documents that were relevant in Florida we now have and are available to Mr. Pelullo in this case. If there are documents

that we don't have that bear on this case, and I doubt that there are, but I will look into it, we'll make them available to Mr. Pelullo." Pet. App. 11a. The district court directed the prosecutor to consult with an agent about the status of the Florida documents, after which the prosecutor advised the court that the government intended "to bring all relevant documents up [from Florida], so we believe we have all of the relevant documents relevant to the Compton case, here." *Ibid.* The following year, in response to petitioner's specific request for the disclosure of relevant documents, the government advised him that the six boxes of documents already disclosed "represent all of the documents obtained through the Florida search and seizure, which we believe may be relevant to the case pending in the District of New Jersey." *Id.* at 12a.

2. There is no merit to the Third Circuit's contention that this case can be "distance[d]" from *Banks* and *Strickler* on the ground that "there is no indication that the government had knowledge about the exculpatory nature of the warehouse documents," Pet. App. 22a, such that the government's affirmative representations are far less susceptible of reliance * * *." *Id.* 29a n.19 (emphasis in original). The government's representations regarding its understanding of the contents of the Florida documents were "less susceptible of reliance" if, and *only* if, the government advised petitioner that it did not know what information the documents contained. In fact, the government did the opposite. It flatly represented not only that the documents were not relevant, but also that it had reviewed the documents. As the district court expressly found and the court of appeals did not doubt, "[t]he *first indication* that the government's assurances were incorrect occurred after the trial in this case when [petitioner's] paralegal examined documents in connection with another proceeding in which defendant was involved." Pet. App. 60a (emphasis added).

Also relevant is the government's decision to cull six boxes of relevant materials from the Florida documents,

which it could have done – or so petitioner reasonably would have understood – only after reviewing the Florida documents for relevance. As was found by the district judge who supervised all of the proceedings in this case, the government's position "ignores the reality of the situation and it ignores the representations that government counsel repeatedly made to the court and to defense counsel that the six boxes of documents that the government extracted from the mass of documents in the Florida warehouse contained everything relevant to defendant's case and that the remaining documents 'are not relevant to this case.'" Pet. App. 59a.

The Third Circuit's contention that the government's *Brady* violation was excused because it was not purposeful is furthermore flawed as a matter of law and fact. It is well-settled that *Brady* is violated by the "inadvertent" failure to disclose relevant evidence to the defense. *Strickler*, 527 U.S. at 289. Accord, *e.g.*, *Gantt*, 389 F.3d at 912 ("*Brady* has no good faith or inadvertence defense." (citing *United States* v. *Agurs*, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." (footnote omitted)); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) ("Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").). The *Brady* rule is designed to ensure that the defendant receives a fair trial, not to punish prosecutors for bad-faith conduct. Moreover, as a matter of fact, the prosecution's misconduct here *was* "knowing" in every relevant sense. The government represented both expressly and impliedly that it had reviewed the Florida documents, *when it knew that it had not done so*. Even if this Court were to change course and announce an exception to *Brady* for inadvertent misconduct, this case accordingly would not fall within that exception.

The Third Circuit also asserted in passing that the government could not be held responsible for its *Brady* violation

because "there could not be any genuine reliance by Pelullo on the government's statements, as there was no realistic opportunity for [his counsel] to review the warehouse documents during the two-week window Pelullo had left him to prepare for trial." Pet. App. 27a. This argument has no real substance. On the question of "reliance," the district court credited the sworn representation of petitioner's counsel (undisputed by the government) that, as he advised the prosecutors at the time, "either I or someone from my law firm would go to Jacksonville to review the documents seized from Mr. Pelullo's warehouse." *Id.* at 15a. There is no basis whatsoever to question that finding, much less overturn it for "clear error." The Third Circuit's point seems to be that the government's conduct was effectively "harmless" because petitioner would have been unable to uncover the evidence even absent the government's misrepresentations. But it could point to no evidence to support that bald assertion, for there is none. To the contrary, once the government's witnesses gave false testimony regarding very specific transactions, petitioner did not need to review the entire mass of documents held by the government. Rather, petitioner only needed to secure particular documents; and the court of appeals *itself* pointed out "*the ease* with which Pelullo discovered the relevant warehouse documents after trial." Pet. App. 28a (emphasis added). There were, moreover, numerous days throughout the trial in which no proceedings occurred and the records could have been searched. At the very least, if prosecutors had finally disclosed at trial that they did not know whether the Florida documents contained relevant evidence impeaching the government's witnesses, petitioner could have sought "a continuance of the trial to allow the defense to examine or investigate" those documents. *United States* v. *Kelly*, 14 F.3d 1169, 1176 (CA7 1994) (continuance is appropriate response to *Brady* disclosure at trial); *United States* v. *Higgins*, 75 F.3d 332, 335 (CA7 1996) (same).[8]

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[8] With respect to the government's separate statements prior to the

The Third Circuit's ruling also represents a direct challenge to the validity of this Court's seminal ruling in *Giglio* v. *United States*, 405 U.S. 150 (1972), which held that the prosecution is obligated to disclose to defendants testimony that impeaches government witnesses. Frequently, *Giglio* obligations arise as a consequence of testimony offered during the trial itself. "[T]he duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). Other courts of appeals accordingly hold that the government is required to disclose evidence when the disclosure becomes relevant; those courts never suggest, as the Third Circuit concluded in this case, that the failure to do so is excusable because it would be "too late" for the defendant to make use of the evidence. See, *e.g.*, *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 895 (CADC 1999); *United States* v. *Hanna*, 55 F.3d 1456, 1460 (CA9 1995); *United States* v. *Kojayan*, 8 F.3d 1315, 1323-24 (CA9 1993).

3. Finally, the Third Circuit stated that two factual circumstances presented by the case were of particular relevance to its analysis. Yet neither factual circumstance undercuts petitioner's *Brady* claim. And neither bears on the Third Circuit's unambiguous explanation that its ruling rested on a supposed "due diligence" obligation for defendants, or other-

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trial period, the court of appeals summarily stated that the district court's factual finding that petitioner's counsel had relied on these pre-trial representations was "fanciful" and "clearly erroneous" because counsel secured a "delay in the trial in order to permit him to review the multitudinous documents possibly relevant to the case, including the warehouse documents." Pet. App. 26a. But, as an accompanying footnote acknowledges, given the government's representations, petitioner's counsel *never* stated that he intended to review the Florida documents. *Id.* at 26a n.17.

wise undercuts the appropriateness of this case as a vehicle for resolving the questions presented.

First, the court of appeals noted that the government had kept in Florida "massive amounts of documents," such that the government faced a "concomitant practical difficulty * * * in discovering and revealing all *Brady*-type material." Pet. App. 19a. That is of course no answer, for the government represented that it knew that the Florida documents did not contain relevant evidence. To accept the government's unsatisfactory excuse would be to undercut very substantially the *Brady* rights of defendants in commercial white collar prosecutions, which regularly involve vast collections of documents.

Second, the court of appeals relied on the fact that the documents in question were the records of businesses controlled by petitioner. Pet. App. 21a. However, courts that decline to adopt a "due diligence" standard would deem this fact irrelevant. See *supra* at 12-16 (discussing precedents holding that *Brady* is violated by failure to make disclosure of evidence known to the defendant personally). Moreover, even if a special rule should apply when the defendant has personal knowledge of the evidence in question, this is not such a case. There is no serious suggestion that petitioner had personal knowledge of all the documents held by the government, the overwhelming majority of which were not created by him personally but instead were simply produced by his businesses. As the court of appeals itself emphasized, the government had retained a massive collection of materials. The district court was thus correct to find that "it would be fanciful to expect that [petitioner] would remember in detail the contents of an enormous body of documents assembled in a warehouse." Pet. App. 60a.

In any event, the Third Circuit's emphasis on the petitioner's relationship to the warehouse documents misses the point entirely. Petitioner was unaware of *which* records the government continued to hold in Florida, because prosecutors

had returned 75,000 pounds of documents to him without differentiating that mass of materials from the vast collection they had retained. The *only* representation by the government regarding the retained materials was that they pertained only to the ongoing Florida investigation, *not* the proceedings regarding Compton Press in New Jersey. Thus, when the government's witnesses gave false testimony at trial, it was entirely reasonable that petitioner would not look to the materials held by the government in Florida for documents that would establish the truth.[9]

* * * *

Because the Third Circuit's holding that the prosecutor's misrepresentations in this case were excused by petitioner's ability to review the Florida documents is wrong on the merits, and because the question presents a fundamental issue regarding the government's *Brady* obligations, certiorari should be granted.

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[9] In any event, the government also withheld a significant handwriting report that was not a record produced by any of petitioner's businesses. Although petitioner was a party to prior litigation in which the report was submitted, he was not aware of the report because he was involved only in unrelated claims in that case. Pet. App. 67a. The government's failure to disclose the report thus can be sustained only on the theory that petitioner had a "due diligence" obligation to uncover it on his own. See Gov't C.A. Br. 65-66 ("Even if [petitioner] did not personally receive a copy of the report, those opinions provided him with sufficient notice of the report's existence to preclude a finding that the government suppressed it.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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